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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 907

ABRAHAM DOBKIN, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

ABRAHAM DOBKIN, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on October 15, 1964 (rehearing denied January 15, 1964). The judgment affirmed petitioner's conviction for violating the unlicensed adoption statute of the District of Columbia, D.C. Code § 32-785, 788, Act of April 22, 1944, c. 174, 58 Stat. 194, 195.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 194 A.2d 657 (1963). (App. 1a-5a). The order of the United States Court of Appeals for the District of Columbia Circuit affirming that judgment is not reported (App. 7a).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 15, 1964 (App. 7a). A timely petition for rehearing *en banc* was denied on January 15, 1965, one judge dissenting (App. 8a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES INVOLVED

D.C. Code, § 11-715a, Act of March 3, 1925, c.443 (43 Stat. 1120), provides in pertinent part as follows:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury."

D.C. Code, § 22-104, Act of March 3, 1901, c.854 (31 Stat. 1337), provides:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

QUESTIONS PRESENTED

1. Whether the multiple offender statute of the District of Columbia, D.C. Code § 22-104, by which the permissible penalty is increased by 50 percent upon a second conviction, places the petitioner within the class of persons entitled by statute to a trial by jury under D.C. Code § 11-715a.

2. Whether the petitioner, a Jew, could have constitutionally been required over his objections to proceed to trial after sundown on Friday, the advent of his religious sabbath.

STATEMENT

Petitioner, a practicing attorney, was convicted and sentenced by the District of Columbia Court of General Sessions sitting without a jury, upon an information charging him with violating the District of Columbia unlicensed adoption statute, D.C. Code §§ 32-781 to 32-789. This petition raises two questions with respect to the manner in which the petitioner was tried.

Notwithstanding that the offense of which petitioner was charged carried a maximum penalty of $300 and ninety days and thus was not one in which a jury trial was constitutionally required, *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); *Rogers* v. *District of Columbia*, 31 A.2d 649 (D.C.Mun.App. 1942), petitioner moved prior to trial that he be tried by a jury. As a second offender under that statute, the maximum punishment which he could have received was 50 percent greater. This increased penalty should have entitled him by statute to a jury trial. The motion was denied by a judge of the Court of General Sessions. Immediately prior to the time the trial was to com-

mence, the petitioner notified the court that his religious sabbath had begun, and asked for an adjournment from Friday night until Monday morning. This request was denied and the trial went forward. The petitioner was convicted at 8:15 p.m. on Friday night. The District of Columbia Court of Appeals affirmed the conviction (App. 1a-5a) holding: (1) that due process barred the imposition of second offender punishment in the absence of being charged as such and (2) that petitioner's religiously founded objection to a trial on his sabbath was not well taken. A division of the United States Court of Appeals for the District of Columbia Circuit granted a petition for review of that judgment (App. 6a). Another division affirmed, per curiam, on the basis of the lower court opinion (App. 7a) and a petition for rehearing *en banc* was denied, Circuit Judge Fahy dissenting (App. 8a).

REASONS FOR GRANTING THE WRIT

1. D.C. Code § 11-715a, the minor offense statute, reads:

> "In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury."

But, D.C. Code § 22-104, a correlative statute, provides:

> "Every person upon his second conviction of any criminal offense punishable by fine or impris-

> onment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

By virtue of the second statute that provides a 50 percent greater penalty upon the second conviction of certain offense (including the one for which the petitioner was convicted), petitioner's permissible sentence was 135 days and $450, clearly within the jury trial provisions of D.C. Code 11-715a.

Both the District of Columbia and the court below sought to avoid the logic of this argument by asserting that since the petitioner was not specifically charged as a second offender in this information, he could not, consonant with due process, have been given the increased penalty. They further reasoned that since he could not have been given the increased penalty, he was not entitled to trial by jury. This argument, however, founders upon the holding of *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962), that a second offender need not be so charged to justify the imposition of multiple offender punishment. The criminal act which is proscribed for a second offense is the same regardless of the background of the criminal. The previous offense is merely an "historical fact" as a result of which the penalty may appropriately be increased because of the demonstrated proclivities of the defendant. *Jordan* v. *United States District Court*, 233 F.2d 362, 367 (D.C. Cir. 1956). What was present here was the historical fact of a prior conviction as a result of which the petitioner could receive a more serious penalty. And as a result of such increased penalty, in this case, the petitioner fell within the provisions of D.C. Code, § 11-

715a, and was entitled by statute to a trial by jury. The right to trial by jury, a right "so fundamental and sacred to the citizen, whether guaranteed by the constitution or provided by statute," must be zealously safeguarded by the courts. *Jacob* v. *City of New York*, 315 U.S. 752, 753 (1952). The lower courts both erred in failing to recognize this. *Jacobs* v. *United States*, 24 F.2d 890 (D.C. Cir. 1928), which was considered controlling by the courts below, held that a party proceeded against under the statute involved in that case for a second or third offense had a right to have that fact averred in the indictment. But that decision was one compelled by that statute, which itself required "allegation and proof of prior conviction" in the indictment. See *Jackson* v. *United States*, 221 F.2d 883, 885 (D.C. Cir. 1955), n.2. Reliance upon *Jacobs*, in the absence of a statute requiring such a result, misconceives the import of *Oyler* v. *Boles, supra.* .

This Court, in *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937), upheld the constitutionality of allowing the Court of General Sessions to proceed without a jury in criminal cases in which the offense carried a penalty of up to ninety days. But Justice Stone cautioned:

> ". . . commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty thought mild may come to be regarded as so harsh as to call for the jury trial . . ." 300 U.S. at 627.

Whether reconsideration of *Clawans* is called for need not now be decided. But *cf. Rollerson* v. *United States*, — F.2d —, — (D.C. Cir. No. 17675, 10/1/64. In the light of *Clawans*, however, the statutes involved, D.C. Code §§ 11-715a and 22-104, must be interpreted in circumstances such as these to authorize a jury

trial in order to insure their constitutionality. The failure of the courts below to recognize this fact was error.

2. When this case was called for trial on Friday, December 14, 1962, it was after 6 p.m. The petitioner's religious sabbath began at sundown that day, at 4:47 p.m. When he raised this with the trial court and asked for an adjournment only until Monday morning, his request was denied.

The authorities are uniform that Sunday, at common law, was *dies non juridicus*. *State* v. *Rhodes*, 11 N. J. 515, 95 A. 2d 383 (1953); *Housing Authority of Dallas* v. *Blackman*, 254 S.W. 2d 548 (Tex. Civ. App. 1952); *State* v. *Hereford*, 131 W. Va. 84, 45 S.E. 2d 738 (1947); *Pedersen* v. *Logan Square State Savings Bank*, 377 Ill. 408, 36 N.E. 2d 732 (1941); *Blizzard* v. *Blizzard*, 62 Ga. App. 2d 244, 8 S.E. 2d 679 (1940); *Harrison* v. *Bayshore Development Company*, 92 Fla. 875, 111 So. 128 (1927). No statute in the District of Columbia has altered the fact.

The recognition of Sunday as "dies non juridicus" was religious in origin. This court's decision in *McGowan* v. *Maryland*, 366 U.S. 420, 431 (1961) makes that clear. It was made equally clear in *Story* v. *Elliot*, 8 Cowen 27, 28 (N.Y. 1841), where the court observed:

> "Sunday is stated in all the books to be *dies non juridicus;* not made so by the statute: but by a canon of the church, incorporated into the common law."

If the recognition of Sunday as "dies non juridicus" arises from religion, as it clearly does, it must be abundantly clear that one who observes a day other than Sunday ought not to be forced to violate his be-

liefs by being forced to litigate on his sabbath. The court below recognized that basic principle when it held:

> "We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship." (App. 3a).

But once having adopted this principle, the court erred by going behind the petitioner's beliefs and practices and deciding whether he observed his sabbath sufficiently to come within that rule. Such an inquiry is not constitutionally permissible. Church attendance or nonattendance is not a matter of governmental inquiry. *McCollum* v. *Board of Education,* 333 U.S. 203, 210 (1948). And in *Braunfield* v. *Brown,* 366 U.S. 599, 609 (1961), this Court indicated that an "inquiry into the sincerity of the individual's religious beliefs" would raise serious constitutional issues. Yet this is precisely what the trial court did and what the courts below sanctioned.

What the courts below all failed to do was to strike a proper balance between the petitoner's right to the unfettered exercise of his conscientious beliefs and the government's right to insure the orderly functioning of the courts. Reduced from this abstract principle to application in this case, what should have been balanced was the petitioner's right to observe his sabbath as opposed to the government's desire to have him tried on Friday evening, rather than on Monday morning. Stated in these terms, it seems hardly to admit of argument that the petitioner was entitled to the adjournment which he requested.

Very close analogy is found in *In re Jenison,* 265 Minn. 96, 120 N.W. 2d 39 (1963), certiorari granted

and case remanded 375 U.S. 14 (1963), reversed on remand, — Minn —, 125 N.W. 588 (1963), and in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Both cases illustrate the type of balancing of rights that should have been done by the courts below. Mrs. Jenison was convicted of contempt for refusal to serve on a jury because of her literal belief in the Biblical admonition "judge not lest ye be judged." Her conviction was affirmed on the grounds that the state's need of jurors outweighed her religiously based refusal to act as such. *In re Jenison*, 265 Minn. 96, 120 N.W. 2d 39 (1963). On petition for certiorari, this Court granted the petition, vacated the judgment and remanded the case for further consideration "in light of *Sherbert* v. *Verner*, 374 U.S. 398." *In re Jenison*, 375 U.S. 14 (1963). In *Sherbert* v. *Verner, supra*, this Court reversed the denial of unemployment compensation benefits to a Seventh Day Adventist for her refusal to work on Saturday. The opinion clearly suggested that the interests of the state must well outweigh the religious interests of the particular applicant before any state action can impinge upon a First Amendment religious right. The Supreme Court of Minnesota on remand in *In re Jenison*, — Minn. —, —, 125 N.W. 2d, 588, 589 (1963) recognized this when it held:

> "Upon reconsideration we have come to the conclusion *there has been an inadequate showing that the state's interest* in obtaining jurors *requires us to override relator's right to the free exercise of her religion.* Consequently, we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt." (Emphasis supplied.)

In accord see *People* v. *Woody*, — Cal. 2d —, 394 P. 2d 813 (1964).

No reasonable argument can be made for requiring a trial on Friday night. The District of Columbia asserted that such a trial was necessary because "the government's necessary witness would be returning to her home in North Carolina, beyond the jurisdiction of the Court." Brief for Appellee in United States Court of Appeals in Opposition to Petition for Allowance of an Appeal, p. 8. But no reason is given why this witness could not have been placed under subpoena either to require her to remain in the District of Columbia until Monday or to return here on that day. That such power existed has never been denied. The government also asserted that this was but a delaying tactic; yet, no suggestion has yet been made as to what the petitioner could hope to accomplish in delaying the case between Friday and Monday. In short, the District of Columbia advanced no reason whatever why trial had to be between 6:07 p.m. and 8:15 p.m. on Friday night rather than on Monday morning. Under these circumstances, it was error of constitutional magnitude to force the appellant to proceed to trial. And under such circumstances, this Court would be justified in according this case the same summary remand as in *In re Jenicm, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be granted.

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February, 1965

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3248

ABRAHAM DOBKIN, *Appellant,*

v.

DISTRICT OF COLUMBIA, *Appellee.*

Appeal from the District of Columbia
Court of General Sessions

(Argued September 23, 1963 Decided November 4, 1963)

Before HOOD, Chief Judge, MYERS, Associate Judge, and CAYTON (Chief Judge, Retired).

CAYTON, *J.:* Appellant, a practicing lawyer, was convicted of violating the so-called Baby Broker Act. Code 1961, §§ 32-781 to 32-789. He contends (1) that the statute is unconstitutional and that the evidence did not support a conviction; (2) that the arrest warrant was invalid because based on hearsay evidence; (3) that he was illegally arrested at 12:30 a.m.; (4) that he was entitled to a continuance because the trial was extending into his Sabbath; and (5) that he was entitled to a jury trial.

We will consider together the claims of unconstitutionality and insufficiency of the evidence. The governing language of the statute, Code 1961, § 32-785 provides:

> "No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption. * * *"

Appellant says the Act is vague and indefinite, and therefore unconstitutional. In two earlier cases, also involving lawyer defendants, we held that the standards prescribed

in the Act were reasonable and clear, and conveyed a sufficiently definite warning as to conduct that will amount to a violation. We said:

> "We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinquishing or adopting parents; so long as he refrains from serving as intermediary, go-between, or placing agent; so long as he leaves or refers the placement of children and the arrangements for their placement to agencies duly licensed, he is within his rights under the statute. * * *" *Goodman* v. *District of Columbia,* D.C.Mun.App., 50 A.2d 812, 815; *Anderson* v. *District of Columbia,* D.C.Mun.App., 154 A.2d 717, 719.

The evidence against appellant was that a woman expecting a child contacted him and asked for help in placing the child for adoption; that appellant later called the expectant mother informing her that a couple from New York, who were interested in adopting her baby, would be in town and he arranged a meeting between them; that the New York couple gave him money to be used in supporting the expectant mother; that when the baby was born the mother contacted appellant who went to the hospital and had her sign adoption papers he had prepared; that appellant and the couple escorted the mother and the baby from the hospital, and the couple then took the child with them and the mother went home.

Appellant's testimony did not vary substantially from the above except that he stated after his meeting with the mother, he was contacted by the New York couple who said they knew of a woman in Washington who wanted to place her expected child for adoption. He said they gave him the name of the woman with whom he had already conferred. It is apparent that appellant's course of dealing showed him to be in violation of the statute and justified a conviction.

We find no validity in appellant's contention that the arrest warrant, because based on hearsay evidence, violated

the Fourth Amendment and the Federal Rules of Criminal Procedure. It is settled that an arrest can be made on the basis of hearsay evidence even if the arresting officer does not have a warrant, so long as probable cause exists. *Draper* v. *United States,* 358 U.S. 307.[1] Nor is there any basis for holding, as appellant would have us do, that the warrant of arrest should have been quashed because it was served upon him at 12:30 a.m. The circumstances of his arrest did not impair the jurisdiction of the court to try him. *United States* v. *McNeil,* D.C.Mun.App., 91 A.2d 849, citing *Frisbie* v. *Collins,* 342 U.S. 519.

We next consider appellant's contention that his "right to religious freedom" was violated because he, a member of the (Reform or "liberal") Jewish faith, was forced to proceed with his trial after sundown on a Friday—the advent of the Jewish Sabbath. We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship. But here, inquiring into the situation, the trial court learned from appellant that he actually went to his office and worked on Saturdays, and was justified in concluding that there was no valid religious basis for putting the trial over to another day. Other circumstances, including the fact that the trial had been, without objection, reset for that day and hour, indicate that there was no prejudice in this situation.

We now turn to appellant's claim that he was entitled to a jury trial. First, he relies on Code 1961, § 11-715a,[2] which provides that a defendant is entitled to a jury trial if the

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[1] See also *Jones* v. *United States,* 362 U.S. 257, where hearsay evidence was upheld as properly supporting the issuance of a search warrant.

[2] Code 1961, § 11-715a provides: "* * * In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury. * * *"

fine or penalty may be *more than* $300, or imprisonment may *be more than* ninety days. The maximum penalty for violating the Act is a fine of up to $300 or imprisonment up to ninety days, or both.[3] Appellant argues that in applying § 11-715a, we may add days to dollars and vice versa in determining whether the "more than" requirement of the statute has been met so as to entitle him to a jury trial. But we think it clear that when § 11-715a states that "the fine or penalty may be more than $300," the words "fine or penalty" refer only to money, and that similarly "imprisonment" in the following phrase refers only to time and not dollars. We adhere to the ruling made in *Rogers* v. *District of Columbia*, D.C.Mun.App., 31 A.2d 649, and hold that under the statute appellant was not entitled to a jury trial.

Appellant also argues that he is entitled to a jury trial because this was his second conviction under the same statute and hence he was liable to be subjected to a fine or imprisonment (or both) fifty percent greater than the maximum fine and imprisonment allowable for the first offense. He cites Code 1961, § 22-104, which states:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one half longer than the maximum fine and imprisonment for the first offense."

The real question is whether a defendant is subject to the fifty percent greater penalties just stated if he has not been given notice prior to trial that the prosecution will ask for the added penalties. Obviously it is imperative that a defendant have knowledge of the penalty he may receive, because his right to a jury trial depends on the severity of the punishment. In second offender cases, knowledge of what penalty will be demanded rests solely with the government, and this places a duty on the government to impart such knowledge to the defendant in time for him to demand

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[3] Code 1961, § 23-788.

a jury trial. The importance of this is revealed in the instant case where liability to the fifty percent greater penalty would have enabled appellant to fall within § 11-715a. Since no notice was given to appellant that the government intended asking for the greater penalties, he was only subject to the penalty that could be imposed on a first offender.

This case is similar to *Jacobs* v. *United States*, 58 App. D.C. 62, 24 F.2d 890, decided in 1928, where the defendant had been tried for a second offense against the National Prohibition Act. The court said:

> "In a case where a party is proceeded against for a second or third offense under the statute, and the sentence prescribed is different from the first by reason of its being a second or third offense, the fact thus relied on must be averred in the indictment. * * *" *Id.*, 58 App.D.C. at 63, 24 F.2d at 891.

In essence the decision required that a defendant receive advance notice if the protection intended to ask that he receive a greater punishment because of his prior offense(s). That reasoning applies here.[4] If a defendant is to be subjected to the fifty percent greater penalty under § 22-104, he is entitled to notice of this prior to trial. Any other ruling in a case like that presently before us would enable the government to deprive a defendant of the right to a jury trial by not requesting the added penalties until time of sentencing. In this case the government gave no notice to appellant prior to trial that he might be subjected to the added penalties of § 22-104; consequently he could not have been subjected to them. Therefore, the penalties appellant could have received were not sufficient to entitle him to a jury trial.

Affirmed.

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[4] This reasoning is not affected by what was said in *Jordan* v. *United States District Court for Dist. of Col.*, 98 U.S. App. D.C. 160, 233 F. 2d 362, and *Jackson* v. *United States*, 95 U.S. App. D.C. 328, 221 F. 2d 883.

Filed February 3, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,266

ABRAHAM DOBKIN, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

Before: Fahy, Washington, and Bastian, Circuit Judges, in Chambers.

Order

On consideration of petitioner's petition for the allowance of an appeal from a judgment of the District of Columbia Court of Appeals, and of the briefs filed by the parties herein, it is

ORDERED by the court that petitioner's petition be granted and petitioner is hereby allowed to prosecute an appeal from the judgment of the District of Columbia Court of Appeals in case No. 3248.

Per Curiam.

Dated: February 3, 1964

Filed October 15, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,266

ABRAHAM DOBKIN, *Appellant*,

v.

DISTRICT OF COLUMBIA, *Appellee*.

Appeal from the District of Columbia Court of Appeals.

Before: Wilbur K. Miller, Burger and McGowan, Circuit Judges.

Judgment

This case came on to be heard on the record from the District of Columbia Court of Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District of Columbia Court of Appeals is affirmed on the basis of the opinion of Judge Nathan Cayton, *Dobkin* v. *District of Columbia*, 194 A. (2d) 657 (1963).

It is further ORDERED by the court that appellee herein recover from appellant its taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: October 15, 1964

Filed January 15, 1965

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,266

ABRAHAM DOBKIN, *Appellant,*

v.

DISTRICT OF COLUMBIA, *Appellee.*

Before: Bazelon, Chief Judge, and Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

Order

On consideration of appellant's petition for rehearing *en banc*, and of appellee's opposition thereto, and there not being a majority of the Circuit Judges of this Circuit in favor of a rehearing of the above-entitled case by the Court *en banc*, it is

ORDERED that appellant's aforesaid petition is denied.

For the Court:

Chief Judge

Dated: January 15, 1965

Circuit Judge Fahy would grant appellant's petition on the question of the right to a jury trial.

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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

October Term, 1964

No. 907

ABRAHAM DOBKIN, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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ACT OF CONGRESS CITED

Act of April 22, 1944, c. 174, s. 5, 58 Stat. 194, as amended by the Act of June 8, 1954, c. 273, s. 3, 68 Stat. 247 2

IN THE

Supreme Court of the United States

October Term, 1964

No. 907

ABRAHAM DOBKIN, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Where an accused is not charged as a second offender, where the trial judge is not, prior to or during the trial, otherwise informed of his prior conviction for the same offense, and where the penalty imposed is no greater than that prescribed for a first offense, does the accused have the right to a trial by jury simply because Section 22-104, D. C.

Code, 1961, authorizes, upon a second conviction for any criminal offense punishable by fine or imprisonment or both, the imposition of "* * * a fine not exceeding fifty per centum greater, and * * * imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense"?

2. Whether the trial court, in denying petitioner's request for an adjournment of the trial, was justified in concluding from petitioner's own testimony and actions, as well as from other surrounding facts and circumstances, that there existed no valid religious basis for such an adjournment.

STATEMENT OF THE CASE

Petitioner was convicted in the District of Columbia Court of General Sessions of violating those provisions of the "Baby Broker's Act"[1] which read:

> "No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption. * * *" [Section 32-785, D. C. Code, 1961.]

Prior to trial, petitioner moved that his case be tried before a jury (R. 3). Although he had been previously convicted of the same offense, he was not charged as a second offender, he did not inform the court of such prior conviction, and he made no assertion that he was entitled to a jury trial by virtue of the fact that he was a second

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[1] Act of April 22, 1944, c. 171, s. 5, 58 Stat. 194, as amended by the Act of June 8, 1954, c. 273, s. 3, 68 Stat. 247 (Section 32-785, D. C. Code, 1961).

offender (R. 5-6). The motion was denied, and was not renewed at trial.

At trial, which, by agreement of counsel, had been scheduled to commence at 5:00 p. m. on Friday, December 14, 1962, petitioner, after being sworn as a witness, and subsequent to argument on and disposition of several motions, moved for an adjournment of the trial on the ground that his Sabbath had begun at 4:47 p. m. that evening (R. 9). The trial judge, following a hearing, denied the motion, concluding that it was made for purposes of delay (R. 16).

At the conclusion of the trial, petitioner was found guilty as charged, and a sentence of 90 days in jail and a fine of $300 was imposed (R. 55).

Petitioner appealed to the District of Columbia Court of Appeals, which affirmed the judgment of conviction (R. 60). The United States Court of Appeals for the District of Columbia Circuit allowed an appeal, and a division of that court affirmed the judgment of the District of Columbia Court of Appeals on the basis of the latter court's opinion in *Dobkin* v. *District of Columbia*, 194 A. 2d 657 (1963) (App. 7a).[2] A petition for rehearing en banc was denied—one judge dissenting (App. 8a).

REASONS WHY WRIT SHOULD BE DENIED

I

Petitioner was not entitled to a jury trial.

Section 16-705, D. C. Code (Supp. IV, 1965), provides, in pertinent part, that:

> "(b) In any case where the accused would not by force of the Constitution of the United States

[2] References to "App." refer to the Appendix contained in petitioner's brief.

> be entitled to a trial by jury, the trial shall be by the court without a jury, unless it is a case wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days and the accused demands a trial by jury. In the latter case the trial shall be by jury."

Petitioner makes no contention in this Court that he was entitled to a jury trial by virtue of the above statutory provision or by virtue of the Constitution of the United States. Instead, he asserts that he is a second offender, and, as such was entitled to a jury trial under Section 22-104, D. C. Code, 1961, which provides that:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

Since the maximum fine and imprisonment for the first offense is $300 or 90 days or both, petitioner argues that Section 22-104, *supra*, increased the possible fine and imprisonment that could have been imposed upon him to $450 or 135 days or both, thereby bringing his case within the ambit of the jury trial provisions set forth in Section 16-705, *supra*.

If Section 22-104, *supra*, is to have any affect on one's right to a jury trial, the fact of a prior conviction must certainly be alleged in the information. Otherwise, the trial court is without the necessary facts to enable it to decide whether the possible penalty to which a particular accused may be subjected is such as to entitle him to a jury trial. Here, for example, the petitioner not only was neither

charged as nor sentenced as a second offender, but, in addition, when moving for a jury trial, he failed to disclose the fact of his prior conviction for the same offense, and failed to urge the applicability or even the existence of Section 22-104, *supra*. Under these circumstances, petitioner's contention that the trial court erred in failing to give due consideration to facts which were not called to its attention is clearly without merit. As the District of Columbia Court of Appeals so clearly pointed out in its well-reasoned opinion, which was adopted by the United States Court of Appeals:

> "* * * If a defendant is to be subjected to the fifty percent greater penalty under § 22-104, he is entitled to notice of this prior to trial. Any other ruling in a case like that presently before us would enable the government to deprive a defendant of the right to a jury trial by not requesting the added penalties until time of sentencing. * * *"

Oyler v. *Boles*, 368 U. S. 448, *Jordan* v. *United States District Court for Dist. of Col.*, 98 U. S. App. D. C. 160, 233 F. 2d 362, and *Jackson* v. *United States*, 95 U. S. App. D. C. 328, 221 F. 2d 883, relied upon by petitioner, are not apposite. *Oyler* v. *Boles* involved a multiple offender statute, and this Court held that, "* * * although the habitual criminal issue may be combined with the trial of the felony charge, 'it is a distinct issue, and it may appropriately be the subject of separate determination.' * * *" In the other cases cited, the accused was entitled to a jury trial irrespective of the fact that he was a second offender. Therefore, it was unnecessary, in the cases cited by petitioner, to allege in the indictment that the accused was a second offender, because such fact did not, in any respect, affect his rights under the substantive charge.

II

The record discloses no violation of petitioner's right to "religious freedom."

Petitioner contends that, by requiring him to proceed to trial on a Friday evening, the advent of his Sabbath, his constitutional rights were violated. A review of the record, however, discloses that no constitutional question is involved. All that is involved is the question of whether the trial judge abused her discretion in refusing to grant petitioner's eleventh-hour request for a continuance.

Petitioner's case had been continued a number of times. On December 13, 1962, when the case was scheduled for trial, appellant's attorney informed the court that he was engaged in another trial. At that time, because witnesses were in Washington from North Carolina for the trial, "* * * it was agreed that the trial would be held beginning at 5:00 P. M. on Friday, December 14." (See page 3 of petitioner's brief filed in the District of Columbia Court of Appeals.) Appellant's counsel failed to appear in court at 5:00 p. m., but, as a result of a telephone call to him from the trial judge, he appeared at 6:07 p. m. (R. 7). Petitioner, without registering any objection, was sworn as a witness (R. 8-9). Thereafter, following argument and disposition of a number of motions, petitioner moved for an adjournment of the trial, representing to the court that his Sabbath had commenced at 4:47 p. m. that evening, and that it would be a violation of his religious scruples to submit to trial at that time (R. 9).

The trial judge conducted a hearing upon the question at which it was disclosed that petitioner was of the reform or "liberal" Jewish faith; that petitioner had agreed to go to trial at 5:00 p. m. on Friday; that he made no objection to being sworn as a witness; that he apparently had no religious scruples against working in his law office on Satur-

days (R. 13, 14); and that the government's necessary witness would be returning to her home in North Carolina beyond the jurisdiction of the court (R. 16). Under these circumstances, the trial court properly concluded that petitioner's motion for adjournment of the trial was not based upon any religious conviction, but was made solely for the purposes of delay (R. 16). The District of Columbia Court of Appeals very aptly summed it up by saying:

> "* * * We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship. But here, inquiring into the situation, the trial court learned from appellant that he actually went to his office and worked on Saturdays, and was justified in concluding that there was no valid religious basis for putting the trial over to another day. Other circumstances, including the fact that the trial had been, without objection, reset for that day and hour, indicate that there was no prejudice in this situation" (R. 57).

From all of the foregoing, it appears, without any serious question, that petitioner has endeavored to convert a case of a purely local nature into one involving non-existing constitutional issues respecting his right to a jury trial and to the free exercise of his religion. Clearly, therefore, as this Court concluded in *United Surety Company* v. *American Fruit Product Company*, 238 U. S. 140, 142, 59 L. Ed. 1238, 1240, the "* * * constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here. * * *"

CONCLUSION

It is respectfully submitted that the petitioner has presented no substantial and important question calling for re-

view by this Court, and that his petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. In urging that certiorari not be granted on the first point urged by the petitioner (his statutory right to trial by jury), the District of Columbia places primary reliance upon the fact that "he [the petitioner]

failed to disclose the fact of his prior conviction for the same offense." Brief for Respondent in Opposition, p. 5. The respondent did not make this assertion in the District of Columbia Court of Appeals, and that court, apparently satisfied that the petitioner had adequately disclosed his position, decided the contention on the merits (App. 4a-5a).* The argument was made for the first time in the United States Court of Appeals for the District of Columbia Circuit, but that court, by adopting the opinion of the District of Columbia Court of Appeals as the basis for its decision (App. 7a), also went to the merits.

And indeed, both courts must have. Petitioner's request for trial by jury came first before a judge of the Court of General Sessions sitting as Motions Judge (R. 8, 10). It was clear to that judge, from what occurred during that hearing (see R. 10), that petitioner had a prior conviction for the same offense, and the courts below both impliedly so held.

The rule laid down by the District of Columbia Court of Appeals (App. 4a-5a), and that sought by the respondent, is to the effect that the prosecutor, and only the prosecutor, can invoke the multiple offender statute in the District of Columbia. This is implicit from the ruling that the fact of a prior conviction must be averred in the indictment or information (App. 5a). Left unanswered is the petitioner's question—why cannot the defendant bring his prior conviction to the attention of the court and take the chance on increased punishment in exchange for a trial by jury rather than by the court alone.

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* The reference is to the Appendix to the petition for certiorari.

2. In response to petitioner's second ground for certiorari, the respondent shows exactly what governmental interest compelled a trial on Friday night rather than Monday morning—"the government's necessary witness would be returning to her home in North Carolina beyond the jurisdiction of the court." Brief of Respondent in Opposition, p. 7. No reason is now suggested, nor was one ever suggested below, why she could not have been compelled to remain over the week end or to return. The power to do so clearly existed.

The respondent also asserts that "the trial judge conducted a hearing upon the question [i.e., the religious assertion]." Brief for Respondent in Opposition, p. 6. This "hearing" consisted in large part of questioning Jewish spectators in the courtroom, two of whom were Assistants Corporation Counsel (R. 16), as to their understanding of Jewish beliefs (R. 15-18). But religion and religious worship are personal. This Court so held just this term.

> "Moreover, it must be remembered in resolving these [exemption] problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. *In such an intensely personal area*, of course, *the claim of the registrant* that his belief is an essential part of a religious faith *must be given great weight.*" *United States v. Seiger*, ... U.S. ...., ..., 33 U.S. Law Week 4247, 4253 (Emphasis supplied).

Finally, respondent asserts that the trial date and time had been set by agreement. Brief for Respondent in Opposition, p. 6. It may be that petitioner's trial counsel agreed to the setting, but it is uncontroverted on this record that petitioner, himself, moved to object as soon as he realized that the trial had been scheduled for after sundown on Friday. (R. 20-21).

Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 1965